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February 9, 2016

Cynthia Serrano
Agent for Service of Process
McMahon Steel Company, Inc
1880 Nirvana Ave
Chula Vista, CA 91911

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kevin P. McMahon
McMahon Steel Company, Inc
1880 Nirvana Ave
Chula Vista, CA 91911

**Re: Clean Water Act Notice of Intent to Sue/60-Day Notice Letter
McMahon Steel Violations of General Industrial Permit**

Dear Ms. Serrano and Mr. McMahon:

Please accept this letter on behalf of the Coastal Environmental Rights Foundation (CERF) regarding McMahon Steel Company, Inc's violations of the State Water Resources Control Board Water Quality Order No. 97-03-DWQ, Natural Pollutant Discharge Elimination System (NPDES), General Permit No. CAS000001, and Waste Discharge Requirements for Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities (General Industrial Permit).¹ This letter constitutes CERF's notice of intent to sue for violations of the Clean Water Act and General Industrial Permit for the McMahon Steel Company, Inc facility located at 1880 Nirvana Ave, Chula Vista, CA, 91911 ("Facility" or "McMahon"), as set forth in more detail below.

Section 505(b) of the Clean Water Act requires that sixty (60) days prior to the initiation of a citizen's civil lawsuit in Federal District Court under Section 505(a) of the Act, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency for the region in which the violations have occurred, the U.S. Attorney General, and the Chief Administrative Officer for the State in which the violations have occurred (33 U.S.C. § 1365(b)(1)(A)). This letter provides notice of McMahon's Clean Water Act violations and CERF's intent to sue.

I. Coastal Environmental Rights Foundation (CERF)

CERF is a non-profit public benefit corporation organized under the laws of the State of California with its main office in Encinitas, CA. CERF is dedicated to the preservation, protection, and defense of the environment, the wildlife, and the natural resources of the

¹ On April 1, 2014, the State Water Resources Control Board adopted Order No. 2014-0057-DWQ, which amends the Industrial General Permit ("New Industrial Permit"). These amendments became effective on July 1, 2015. All references to the General Industrial Permit are to the Permit as it existed at the time of the violations noted herein.

California Coast. Members of CERF use and enjoy the waters into which pollutants from McMahon's ongoing illegal activities are discharged, namely Otay River, San Diego Bay, and eventually the Pacific Ocean. The public and members of CERF use Otay River and San Diego Bay to fish, boat, kayak, surf, swim, scuba dive, birdwatch, view wildlife, and to engage in scientific studies. The discharge of pollutants by McMahon Facility affects and impairs each of these uses. Thus, the interests of CERF's members have been, are being, and will continue to be adversely affected by McMahon Owners and/or Operators' failure to comply with the Clean Water Act and the General Industrial Permit.

II. Storm Water Pollution and the General Industrial Permit

A. Duty to Comply

Under the Clean Water Act, the discharge of any pollutant to a water of the United States is unlawful except in compliance with certain provisions of the Clean Water Act. (See 33 U.S.C. § 1311 (a)). In California, any person who discharges storm water associated with industrial activity must comply with the terms of the General Industrial Permit in order to lawfully discharge.

The McMahon Owners and/or Operators conduct steel fabrication at the Facility, producing structural steel columns, beams, and braces as well as fences, gates, stairs, railings, screens, and canopies. The Facility SIC Code is 3441, Fabricated Structural Metal, Sector AA. McMahon enrolled as a discharger subject to the General Industrial Permit on August 14, 2012 for its facility located at 1880 Nirvana Ave, Chula Vista, California 91911. McMahon enrolled under the New Industrial Permit on May 1, 2015, WDID Number 9 37I023784. Though McMahon's history at its current location is relatively short, the McMahon Owners and/or Operators have a long history of violating the General Industrial Permit, dating back to early 2003.

Pursuant to Section C(1) of the General Industrial Permit, a facility operator must comply with all conditions of the General Industrial Permit. (See New Industrial Permit, §I.A.8. [dischargers must "comply with all requirements, provisions, limitations, and prohibitions in this General Permit."]). Failure to comply with the General Industrial Permit is a Clean Water Act violation. (General Industrial Permit, § C.1). Any non-compliance further exposes an owner/operator to an (a) enforcement action; (b) General Industrial Permit termination, revocation and re-issuance, or modification; or (c) denial of a General Industrial Permit renewal application. As an enrollee, McMahon has a duty to comply with the General Industrial Permit and New Industrial Permit and is subject to all of the provisions therein.

B. Failure to Monitor

The McMahon Owners and/or Operators have failed to sample as required for the 2012-2013, 2013-2014 and 2014-2015 years. Sections B(5) and (7) of the General Industrial Permit require dischargers to visually observe and collect samples of storm water discharged from all locations where storm water is discharged. Facility operators, including the McMahon Owners and/or Operators, were required to collect samples from at least two qualifying storm events each wet season prior to July 1, 2015. Under the New Industrial Permit, McMahon is required to sample two qualifying storm events during the first half of the reporting period, and two during the latter half. Sampling of stored or contained storm water shall occur any time the stored or

contained storm water is released.

The McMahon Owners and/or Operators have failed to meet these monitoring requirements for the 2012-2013, 2013-2014 and 2014-2015 periods, despite the fact that there were numerous qualifying rain events during these wet seasons. (See Exhibit A, rainfall data). Indeed, during the 2012-2013 reporting period, McMahon admitted as much. Further, though the Facility monitored on May 6, 2015, the McMahon Owners and/or Operators failed to sample all discharge points for Nitrate and Nitrite Nitrogen as required.

The McMahon Owners and/or Operators therefore had numerous opportunities to sample but failed to do so. They are thus subject to penalties in accordance with the General Industrial Permit – punishable by a minimum of \$37,500 per day of violation. (33 U.S.C. §1319(d); 40 CFR 19.4).

C. The McMahon Facility Discharges Contaminated Storm Water in Violation of the General Industrial Permit

Though the McMahon Owners and/or Operators have consistently failed to monitor as required, what monitoring has been reported indicates consistent exceedances and violations of the General Industrial Permit. Discharge Prohibition A(2) of the General Industrial Permit and New Industrial Permit Sections III.C-D prohibit storm water discharges and authorized non-storm water discharges which cause or threaten to cause pollution, contamination, or nuisance.

Receiving Water Limitation C(1) of the Storm Water Permit prohibits storm water discharges to surface or groundwater that adversely impact human health or the environment. In addition, receiving Water Limitation C(2) prohibits storm water discharges and authorized non-storm water discharges, which cause or contribute to an exceedance of any water quality standards or applicable Basin Plan water quality standards. (See New Industrial Permit Receiving Water Limitations VI.A-C).

The California Toxics Rule ("CTR"), 40 C.F.R. 131.38, is an applicable water quality standard. (*Baykeeper v. Kramer Metals, Inc.* (C.D.Cal. 2009) 619 F.Supp.2d 914, 926). "In sum, the CTR is a water quality standard in the General Permit, Receiving Water Limitation C(2). A permittee violates Receiving Water Limitation C(2) when it 'causes or contributes to an exceedance of' such a standard, including the CTR." (*Id.* at 927).

If a discharger violates Water Quality Standards, the General Industrial Permit and the Clean Water Act require that the discharger implement more stringent controls necessary to meet such Water Quality Standards. (General Industrial Permit, Fact Sheet p. viii; 33 U.S.C. § 1311(b)(1)(C)). The McMahon Owners and/or Operators have failed to comply with this requirement, routinely violating Water Quality Standards without implementing BMPs to achieve BAT/BCT or revising the Facility's SWPPP pursuant to General Industrial Permit section (C)(3) and New Industrial Permit Section X.B.1.

As demonstrated by sample data submitted by McMahon, from enrollment on August 14, 2012 through the present, the McMahon Owners and/or Operators have discharged and continue to discharge storm water containing pollutants at levels in violation of water quality prohibitions and limitations during every significant rain event. The McMahon Facility's sampling

data reflects numerous discharge violations (see below). McMahon's own sampling data is not subject to impeachment. (*Baykeeper, supra*, 619 F.Supp. 2d at 927, citing *Sierra Club v. Union Oil Co. of Cal.*, (9th Cir. 1987) 813 F.2d 1480, 1492 ["when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error"]).

This data further demonstrates the McMahon Facility continuously discharges contaminated storm water during rain events which have not been sampled.

No.	Date	Discharge Point	Parameter	Units	Result	Benchmark/WQO
1	5/04/2015	1	Aluminum	mg/L	3.93	.75
2	5/04/2015	1	Iron	mg/L	4.75	.3 (Basin Plan)
3	5/04/2015	1	Zinc	mg/L	.339	.12
4	5/04/2015	1	Nitrate/Nitrite as N	mg/L	.78	.68
5	5/08/2015	2	Aluminum	mg/L	4.92	.75
6	5/08/2015	2	Iron	mg/L	5.81	.3 (Basin Plan)
7	5/08/2015	2	Zinc	mg/L	.302	.12
8	5/08/2015	2	TSS	mg/L	107	100
9	5/08/2015	3	Aluminum	mg/L	7.51	.75
10	5/08/2015	3	Iron	mg/L	10.3	.3 (Basin Plan)
11	5/08/2015	3	Zinc	mg/L	.313	.12
12	5/08/2015	3	TSS	mg/L	238	100
13	10/5/2015	1	Aluminum	mg/L	.95	.75
14	10/5/2015	1	Iron	mg/L	1.5	.3 (Basin Plan)
15	10/5/2015	1	Zinc	mg/L	.62	.12
16	10/5/2015	1	Nitrate/Nitrite as N	mg/L	1.45	.68
17	10/5/2015	1	TSS	mg/L	103	100
18	10/5/2015	2	Aluminum	mg/L	.94	.75
19	10/5/2015	2	Iron	mg/L	1.07	.3 (Basin Plan)
20	10/5/2015	2	Zinc	mg/L	.26	.12
21	10/5/2015	2	Nitrate/Nitrite as N	mg/L	2.48	.68
22	10/5/2015	3	Aluminum	mg/L	2.85	.75
23	10/5/2015	3	Iron	mg/L	5.88	.3 (Basin Plan)
24	10/5/2015	3	Zinc	mg/L	2.25	.12
25	11/3/2015	1	Zinc	mg/L	.13	.12
26	11/3/2015	1	Nitrate/Nitrite as N	mg/L	1.59	.68
27	11/3/2015	2	Aluminum	mg/L	3.89	.75
28	11/3/2015	2	Iron	mg/L	5.08	.3 (Basin Plan)
29	11/3/2015	2	Zinc	mg/L	.17	.12
30	11/3/2015	3	Nitrate/Nitrite as N	mg/L	1.18	.68
31	11/3/2015	3	Zinc	mg/L	.13	.12
32	12/23/2015	1	Nitrate/Nitrite as N	mg/L	2.18	.68

33	12/23/2015	1	Iron	mg/L	.41	.3 (Basin Plan)
34	12/23/2015	1	Zinc	mg/L	.174	.12
35	12/23/2015	2	Nitrate/Nitrite as N	mg/L	2.71	.68
36	12/23/2015	2	Zinc	mg/L	.284	.12
37	12/23/2015	3	Nitrate/Nitrite as N	mg/L	2.02	.68
38	12/23/2015	3	Iron	mg/L	.345	.3 (Basin Plan)
39	12/23/2015	3	Zinc	mg/L	.185	.12

D. Inadequate Storm Water Pollution Prevention Plan

One of the main requirements for the General Industrial Permit is the Storm Water Pollution Prevention Plan (SWPPP). (General Industrial Permit §A; New Industrial Permit §X.). McMahon has not developed an adequate SWPPP as required by the General Permit or New Industrial Permit, with many of the required elements noticeably absent from the McMahon Facility SWPPP. (New Industrial Permit, §X.A.1-10). For example, the SWPPP does not include an adequate site map showing nearby receiving waters, direction of flow, locations where materials are directly exposed to precipitation, or identification of areas of industrial activity. (New Industrial Permit, §X.E). The SWPPP is not dated or signed, and does not include a monitoring plan or a BMP summary table. (New Industrial Permit, §§X. and I.).

The latest McMahon SWPPP, uploaded to SMARTS on August 7, 2015, also fails to identify the receiving waters (Otay River and San Diego Bay) and fails to identify the impaired status of San Diego Bay. Thus, the SWPPP fails to evaluate the Facility's potential contribution of pollutants for which this receiving water is listed.

The latest SWPPP also fails to account for the numerous and repeated violations identified by McMahon's limited monitoring data – ensuring these violations continue. The SWPPP is therefore inadequate. (See New Industrial Permit §I.E.37. ["Compliance with water quality standards may, in some cases, require Dischargers to implement controls that are more protective than controls implemented solely to comply with the technology-based requirements in this General Permit."]).

Every day the McMahon Owners and/or Operators operate the Facility without an adequate SWPPP, is a separate and distinct violation of the General Industrial Permit, New Industrial Permit, and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The McMahon Owners and/or Operators have been in daily and continuous violation of the General Industrial Permit and New Industrial Permit since enrollment on August 14, 2012. These violations are ongoing and the McMahon Owners and/or Operators will continue to be in violation every day they fail provide a SWPPP for the Facility. Thus, the McMahon Owners and/or Operators are liable for civil penalties of up to \$37,500 per day of violation for 1,275 violations of the General Industrial Permit and the Clean Water Act.

III. Remedies

Upon expiration of the 60-day period, CERF will file a citizen suit under Section 505(a) of the Clean Water Act for the above-referenced violations. During the 60-day notice period, however, CERF is willing to discuss effective remedies for the violations noted in this letter. If

you wish to pursue such discussions in the absence of litigation, it is suggested that you initiate those discussions immediately. If good faith negotiations are not being made, at the close of the 60-day notice period, CERF will move forward expeditiously with litigation.

McMahon must develop and implement an updated SWPPP, install BMPs to address the numerous water quality violations, and implement a robust monitoring plan. Should the McMahon Owners and/or Operators fail to do so, CERF will file an action against McMahon for its prior, current, and anticipated violations of the Clean Water Act. CERF's action will seek all remedies available under the Clean Water Act § 1365(a)(d). CERF will seek the maximum penalty available under the law which is \$37,500 per day.

CERF may further seek a court order to prevent McMahon from discharging pollutants. A strong or substantial likelihood of success on the merits of CERF's claim exists, and irreparable injuries to the public, public trust resources, and the environments will result if the Facility further discharges pollutants into Otay River and San Diego Bay. The cessation of the Facility's discharge will not cause substantial harm to others, and the public interest would be served in preventing discharge of pollutants into receiving waters.

Lastly, section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs, including attorneys' and experts' fees. CERF will seek to recover all of its costs and fees pursuant to section 505(d).

IV. Conclusion

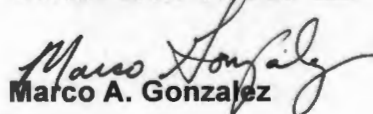
CERF has retained legal counsel to represent it in this matter. Please direct all communications to Coast Law Group:


Marco A. Gonzalez
COAST LAW GROUP LLP
1140 S. Coast Highway 101
Encinitas, CA 92024
Tel: (760) 942-8505 x 102
Fax: (760) 942-8515
Email: marco@coastlawgroup.com

CERF will entertain settlement discussions during the 60-day notice period. Should you wish to pursue settlement, please contact Coast Law Group LLP at your earliest convenience.

Sincerely,

COAST LAW GROUP LLP


Marco A. Gonzalez



Livia Borak
Attorneys for
Coastal Environmental Rights Foundation

Notice of Intent to Sue: Clean Water Act

McMahon Steel

February 9, 2016

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CC:

Jared Blumenfeld, Region 9 Administrator Alexis Strauss, Deputy Regional Administrator U.S. EPA, Region 9 75 Hawthorne Street San Francisco, CA, 94105	Dave Gibson, Executive Officer Catherine Hagan, Staff Counsel San Diego Regional Water Quality Control Board 2375 Northside Drive, Suite 100 San Diego, CA 92108-2700
Gina McCarthy EPA Administrator Mail Code 4101M USEP A Ariel Rios Building (AR) 1200 Pennsylvania Avenue N.W. Washington, DC 20004	Thomas Howard Executive Director State Water Resources Control Board P.O. Box 100 Sacramento, CA 95812-0110

EXHIBIT A

Qualifying Rainfall Events (.1 inches of rain or more) During Business Hours

NOAA National Climactic Data Center

Stations: COOP:047740 - SAN DIEGO LINDBERGH FIELD, CA US

Data Types: HPCP - Precipitation (100th of an inch)

2009

Month	Inches	Time:
6-Feb	0.61	
7-Feb	0.74	
8-Feb	0.2	
9-Feb	0.21	8:00 AM
10-Feb	0.34	
14-Feb	0.13	
16-Feb	0.62	12:00 PM
22-Mar	0.22	11:00 AM
31-May	0.13	
4-Jun	0.13	
29-Nov	0.35	
7-Dec	0.13	9:00 AM
8-Dec	1.99	
12-Dec	0.13	
13-Dec	0.88	
TOTAL	6.81	

2010

Month	Inches	Time:
18-Jan	0.1	4:00 PM
19-Jan	1.4	1:00 PM
20-Jan	7.4	
21-Jan	1.65	12:00 PM
22-Jan	1.41	
23-Jan	0.29	
27-Jan	0.14	
6-Feb	0.17	11:00 AM
7-Feb	0.27	
10-Feb	0.47	
20-Feb	0.49	
22-Feb	0.12	
27-Feb	0.2	
28-Feb	1.27	
7-Mar	0.38	10:00 AM
8-Mar	0.3	
1-Apr	0.49	
6-Apr	0.15	
12-Apr	0.65	4:30 PM
22-Apr	0.47	
6-Oct	0.43	
20-Oct	0.9	12:00 PM
21-Oct	0.12	
30-Oct	0.38	8:00 AM
20-Nov	0.69	2:00 PM
21-Nov	0.12	11:00 AM
24-Nov	0.87	
20-Dec	0.83	
21-Dec	3.46	8:00 AM
22-Dec	0.48	8:00 AM
26-Dec	0.69	
30-Dec	1.8	9:00 AM
TOTAL	28.59	

Qualifying Rainfall Events (.1 inches of rain or more) During Business Hours

NOAA National Climactic Data Center

Stations: COOP:047740 - SAN DIEGO LINDBERGH FIELD, CA US

Data Types: HPCP - Precipitation (100th of an inch)

2011

<u>Month</u>	<u>Inches</u>	<u>Time:</u>
3-Jan	0.85	
4-Jan	0.1	
18-Feb	0.24	5:00 AM
20-Feb	0.2	
26-Feb	0.8	
27-Feb	0.22	
7-Mar	0.2	
21-Mar	0.89	
22-Mar	0.14	
24-Mar	0.25	
26-Mar	0.15	
9-Apr	0.14	
18-May	0.73	
29-May	0.1	
4-Nov	0.34	4:00 PM
12-Nov	1.04	1:00 PM
12-Dec	0.96	9:00 AM
TOTAL	7.35	

2012

<u>Month</u>	<u>Inches</u>	<u>Time:</u>
23-Jan	0.2	2:00 PM
24-Jan	0.28	
7-Feb	0.23	4:00 PM
14-Feb	0.34	
16-Feb	0.2	
28-Feb	0.72	
17-Mar	0.24	1:00 PM
18-Mar	0.47	
25-Mar	0.43	5:00 PM
1-Apr	0.11	
11-Apr	0.45	
13-Apr	0.33	4:00 PM
26-Apr	0.61	
12-Oct	0.77	
8-Nov	0.14	
1-Dec	0.23	
13-Dec	1.6	8:00 AM
14-Dec	0.28	
15-Dec	0.37	
19-Dec	0.47	
25-Dec	0.37	
30-Dec	0.28	
TOTAL	9.12	

Qualifying Rainfall Events (.1 inches of rain or more) During Business Hours

NOAA National Climactic Data Center

Stations: COOP:047740 - SAN DIEGO LINDBERGH FIELD, CA US

Data Types: HPCP - Precipitation (100th of an inch)

2013

<u>Month</u>	<u>Inches</u>
7-Jan	0.26
25-Jan	0.23
26-Jan	0.73
27-Jan	0.1
9-Feb	0.15
20-Feb	0.3
9-Mar	0.2
21-Nov	0.28
22-Nov	0.2
8-Dec	0.17
20-Dec	0.1
TOTAL	2.72

2014

<u>Month</u>	<u>Inches</u>
3-Feb	0.25
7-Feb	0.37
27-Feb	0.1
28-Feb	0.46
1-Mar	0.76
2-Mar	0.6
2-Apr	0.22
26-Apr	0.13
TOTAL	2.89